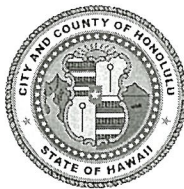


Authorization *Dean Uchida, Director*  
Advertisement *April 16, 2021*  
Public Hearing *April 28, 2021*

DEPARTMENT OF PLANNING AND PERMITTING  
**CITY AND COUNTY OF HONOLULU**  
650 SOUTH KING STREET, 7<sup>TH</sup> FLOOR • HONOLULU, HAWAII 96813  
PHONE: (808) 768-8000 • FAX: (808) 768-6041  
DEPT. WEB SITE: [www.honoluluodpp.org](http://www.honoluluodpp.org) • CITY WEB SITE: [www.honolulu.gov](http://www.honolulu.gov)

RICK BLANGIARDI  
MAYOR



DEAN UCHIDA  
DIRECTOR

DAWN TAKEUCHI APUNA  
DEPUTY DIRECTOR

EUGENE H. TAKAHASHI  
DEPUTY DIRECTOR

April 14, 2021

**MEMORANDUM**

TO: Brian Lee, Chair  
and Members of the Planning Commission

FROM: Dean Uchida, Director *[Signature]*  
Department of Planning and Permitting

SUBJECT: Request for Amendments to Chapter 21, Revised Ordinances of Honolulu  
1990 (The Land Use Ordinance), Relating to Nonconforming Uses

DEPT OF PLANNING  
AND PERMITTING  
CITY & COUNTY OF HONOLULU

21 APR 14 P1:31

RECEIVED

Transmitted for appropriate action is my report and recommendation for proposed amendments to the Land Use Ordinance (LUO), relating to nonconforming uses, as follows:

Resolution No. 20-56, FD1, Relating to Nonconforming Uses: Amends LUO Section 21-4.110(c), Nonconforming Uses, to allow ordinary repairs on the nonconforming use portion of a structure to exceed 10 percent of the current replacement cost when the work is required to comply with City, State, or Federal mandates, or when the work involves that portion of a structure devoted to nonconforming hotel use.

The Resolution and respective Draft Bill for the proposed LUO Amendments are attached. We recommend the proposal be deferred. We are happy to answer any questions you may have concerning this matter during the Public Hearing.

Attachments

cc: City Council

# LAND USE ORDINANCE AMENDMENT – A COUNCIL-INITIATED PROPOSAL RELATING TO NONCONFORMING USES

## Staff Report

April 14, 2021

### I. BACKGROUND

On July 8, 2020, the City Council adopted Resolution No. 20-56, FD1 (Resolution attached), initiating amendments to Chapter 21, Revised Ordinances of Honolulu (the Land Use Ordinance [LUO]), relating to nonconforming uses. The purpose of the proposed ordinance is to amend LUO Section 21-4.110(c), Nonconforming Uses, to allow ordinary repairs on the nonconforming use portion of a structure to exceed 10 percent of the current replacement cost when the work is required to comply with City, State, or Federal mandates, or when the work involves that portion of a structure devoted to nonconforming hotel use.

### II. FINDINGS OF FACT

**Nonconformities and the LUO:** Section 21-4.110 of the LUO (Nonconformities) is a comprehensive strategy to regulate nonconforming lots, structures, uses, dwelling units, and parking and loading. The preamble states constraints should be put on nonconformities to facilitate eventual conformity with the current development standards of the LUO. Other Sections of the LUO address nonconforming signs and nonconformities in certain Special Districts. The proposed amendment only addresses nonconforming uses.

**Definition of Nonconforming Uses:** The LUO (Section 21-10.1) defines nonconforming uses as follows:

Nonconforming use means any use of a structure or a zoning lot which was previously lawful but which does not conform to the applicable use regulations of the District in which it is located, either on October 22, 1986 or as a result of any subsequent amendment to this Chapter, or a zoning map amendment.

**Ordinary Repairs:** The Resolution proposes substantive changes to LUO Section 21-4.110, subsection (c)(3), which states work may be done on any structure devoted in whole or in part to a nonconforming use, provided that work on the nonconforming use portion shall be limited to ordinary repairs. Ordinary repairs are defined as either:

- (A) The repair or replacement of existing walls, floors, roofs, fixtures, wiring, or plumbing;

- (B) Work required to comply with City, State, or Federal mandates; or
- (C) Interior or exterior alterations, provided that there is no physical expansion or intensification of the nonconforming use.

The subsection further states that ordinary repairs shall not exceed 10 percent of the current replacement cost of the structure within a 12-month period, and the floor area of the structure (as it existed on October 22, 1986, or on the date of any subsequent amendment to this chapter pursuant to which a lawful use became nonconforming) shall not be increased.

### III. ANALYSIS

**Purpose of the LUO:** The LUO establishes zoning districts with use and development standards in order to encourage orderly development in accordance with adopted land use policies, including the General Plan, Development Plans, and Sustainable Communities Plans, and to promote public health, safety, and welfare. Regulations that bring development into conformity with adopted land use policies are essential to achieve the City's goals and community's vision.

**Proposed Amendment:** The proposed amendment would eliminate constraints on nonconforming uses when the government mandates repairs or when repairs involve a portion of a structure devoted to nonconforming hotel use. It removes strict limits on nonconforming uses that are necessary to discourage the perpetuation of these uses, which facilitates the timely conversion to uses that conform to the LUO.

One of the intents of the Resolution is to allow nonconforming hotels to undertake major renovations all at once, instead of having to plan for multiple minor repairs over a period of time. This is in direct conflict with the long established goals and policies of both the Department of Planning and Permitting (DPP) and the City and County of Honolulu as a whole. The existing regulations limiting repairs for nonconforming uses are precisely intended to prevent those major renovations, which could extend the life of the nonconformity indefinitely. The Council-adopted long-range plans and zoning districts for the island of Oahu have been established over the course of decades of thoughtful deliberation, community outreach, and analysis. Limits on the perpetuation of nonconformities help shape development to realize that vision.

It is not clear whether the proposed amendment is intended to provide relief for a specific Project or situation. It is also not clear why the proposed amendment applies to nonconforming hotels, and not other types of nonconforming uses. The DPP asked whether the proposal was intended to assist with a specific situation, and did not receive a response from the City Council.



**Zoning Theory:** In general, zoning helps ensure that new development and redevelopment proceeds in accordance with long-range plans. Specifically, this can mean matching development to environmental and topographical limitations, preserving neighborhood character, controlling densities to avoid overcrowding and promote land conservation, providing predictable and efficient public services and facilities, and promoting safe and efficient transportation. A major component of zoning policy is to address and phase out nonconformities — potentially detrimental nonconformities in particular. One example of a detrimental nonconforming use is a bar or concert venue with late-night hours in a quiet residential district. Zoning codes nationally employ a variety of strategies to phase out nonconforming uses, including:

- **Prohibition:** Nonconforming uses are immediately prohibited, regardless of their duration or legal status as a nonconformity. This strategy may be limited to nonconforming uses that directly endanger public health, safety, or welfare. The LUO does not employ this strategy.
- **Amortization:** Nonconforming uses must be terminated after a set period of time. Amortization periods can vary in length depending on the size of the owner's investment and the harm caused by the use. The general rule of common law is that the owner must be given enough time to realize a reasonable return on their investment. The LUO employed this strategy to phase out illegal transient vacation units and bed and breakfast homes. LUO Sections 21-4.110-1 and -2 gave owners nine months from December 28, 1989, to prove their transient vacation unit or bed and breakfast home had been operating as a nonconforming use continuously since before the LUO was established in 1986. If they provided sufficient proof, they could get a Nonconforming Use Certificate and continue to operate. Otherwise, they would lose nonconforming status and need to terminate the use.
- **Buy-out:** Local governments may purchase properties with nonconforming uses. The LUO does not employ this strategy.
- **Relocation:** Local governments provide land, subsidies, or incentives to relocate nonconforming uses to conforming locations. The LUO does not employ this strategy.
- **Abandonment:** Once the right to continue a nonconforming use is abandoned through nonuse, the use cannot be resumed. The LUO employs this strategy — it stipulates that any nonconforming use that is discontinued for any reason for 12 consecutive months, or for 18 months during any three-year period, cannot be resumed. Temporary cessation of the use for purposes of ordinary repairs for a period not exceeding 120 days during any 12-month period are not to be considered a discontinuation.

- **Limit expansion:** Structures devoted to nonconforming uses may not be expanded, or expansion can be limited to a certain percentage of the structure. The LUO employs this strategy — it prohibits the expansion of nonconforming uses, and hours of operation may not be increased. Further, nonconforming uses cannot extend to any part of a structure or to lot area which was not arranged or designed for such use at the time the LUO was adopted or amended.
- **Limit repairs:** Repairs to nonconforming uses are limited, often to a percentage of the value of the structure. Eventually, when repairs can no longer sustain the use, the use is abandoned. This applies to cases of catastrophic loss (e.g. fires), or neglect. The LUO employs this strategy as described in this report.

The LUO strikes a balanced approach. It avoids heavy-handed techniques like prohibition, which could be seen as unfair and attract legal challenges. It also avoids strategies like buy-outs and relocation, which could place an undue financial burden on taxpayers. It allows a generous time period before enforcing abandonment and provides flexibility for repairs. The LUO relies upon strict expansion and repair limits in order to phase out nonconformities, which in turn works to preserve public health, safety, and welfare by bringing development into conformity with adopted land use policies.

**Waiver of Requirements:** With regard to government mandated repair work, the LUO already includes a mechanism through which its standards can be relaxed. Federally mandated retrofits are eligible for a waiver of the strict application of LUO standards under LUO Section 21-2.130. Therefore, the current LUO already allows City, State, and Federally mandated repairs valued at up to 10 percent of the replacement cost under the nonconformities regulations, and federally mandated repairs exceeding 10 percent of the replacement cost through a waiver of requirements. Federal mandates are often administered through the City and State government, and such mandates would also be eligible for a waiver.

The DPP will grant a Waiver when the Applicant can demonstrate that a mandated retrofit cannot otherwise be made without conflicting with the provisions of the LUO, and that the granting of the Waiver does not adversely affect health, safety, the public welfare, or nearby property improvements. The Applicant bears the burden of proof in showing the reasonableness of a proposed waiver. Common examples of Federal mandates include the Americans with Disabilities Act and the Environmental Protection Agency consent decree related to wastewater management. Federally mandated retrofits that exceed 10 percent of the replacement cost or expand the floor area at nonconforming establishments could still be allowed through an approved Waiver. The proposed amendment would allow government-mandated (including State and County) repairs of any value without a waiver, and therefore, without thorough review of the potential impacts on health, safety, public welfare, nearby properties improvements, or other conformance with the LUO.



#### **IV. RECOMMENDATION**

The DPP cannot support the proposed amendment because it would significantly weaken one of the few mechanisms the City has to address and phase out nonconformities. This, in turn, weakens the City's ability to encourage development that conforms to adopted land use policies and long-range plans, and to promote public health, safety, and welfare. The existing limits on repairs to nonconforming uses strike a harmonious balance that allows small, ordinary repairs and alterations, while prohibiting major renovations — or reconstruction in cases of substantial or complete destruction — that could perpetuate the use. This existing approach allows our community to evolve over time towards the goals and objectives established by the community through its Council-adopted, long-range plans and implemented through the zoning codes.

Many government-mandated repairs can already exceed the 10 percent limit with an approved zoning waiver. It is important to preserve this process to ensure such repairs cannot otherwise be made without contradicting the provisions of the LUO, and that they do not adversely affect health, safety, the public welfare, or nearby property improvements. One option is to amend LUO Section 21-2.130, Waiver of Requirements, so that it applies to City, State, and Federal mandated retrofits, rather than just Federal retrofits. However, Federal mandates are often administered through the City and State government, and such mandates are already eligible for a waiver. Therefore, the DPP does not see a need to amend the subsection relating to waivers at this time.

As explained in the analysis section above, eliminating constraints on repairs to nonconforming hotels would conflict with City goals and policies. Hotels and other transient accommodations in residential districts have been particularly controversial in recent years. As a result, the Council recently empowered the City to strengthen enforcement of illegal short-term rentals. The Council at that time elected not to modify regulations relating to nonconforming hotels. At the heart of this controversy is the desire to retain housing in residential and apartment districts for long-term tenants. The proposed amendment would encourage nonconforming hotels in residential areas to remain indefinitely. This would reduce the housing supply for locals. Therefore, the DPP does not support this proposed amendment and recommends that the Council vote to defer Resolution No. 20-56, FD1.

Lastly, the DPP reminds Council that the DPP is in the process of updating the LUO. To date, the Council has budgeted about \$369,000 for the comprehensive update of the LUO. Phase I outreach of the Project has been completed and a consultant has been hired for the remaining phases. Article 6 (Off-street Parking and Loading) was amended in the fall of 2020. The second round of substantive revisions (amendments to the Master Use Table, Definitions, and Specific Development Standards) are expected to be submitted to Council this summer. The provisions in Article 4, including the Nonconformities section, will be reviewed again holistically as part of the updating effort.